

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In re Estate of ALBERT KELLER, Deceased.

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CAROL DeYOUNG,

Petitioner-Appellee,

v

ROY DOUGLAS KELLER,

Respondent-Appellant.

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UNPUBLISHED

June 26, 2001

No. 220383

Tuscola Probate Court

LC No. 00-028386

Before: Doctoroff, P.J., and Holbrook, Jr. and Hoekstra, JJ.

PER CURIAM.

Respondent, heir at law and former personal representative of the decedent's estate, appeals as of right from the probate court order granting petitioner's objection to the accounting and inventory of the decedent's estate and determining what items were assets of the estate. We affirm in part and reverse in part.

At trial, petitioner, heir at law and current personal representative of the decedent's estate, alleged that funds deposited into a joint savings account were never intended to pass to respondent and that the property formed a part of the estate. Petitioner also maintained that certain items of diamond jewelry that were in the possession of respondent were on loan from the decedent and should be included in the estate's inventory. Petitioner further argued that respondent's claim for reimbursement of funeral expenses should be disallowed because the expenses were paid with money withdrawn from the decedent's savings account prior to his death for the express purpose of paying for his anticipated funeral expenses.

The trial court agreed with petitioner and also found respondent derelict in his duties as personal representative. The trial court appointed petitioner as the new personal representative and required respondent to turn over all assets of the estate and to give an accounting of his administration.

Respondent first argues on appeal that the trial court erred in determining that the joint savings account was part of decedent's estate rather than an account passing to the joint account holder pursuant to the right of survivorship. Specifically, respondent contends that the

presumption of the right of survivorship inherent in the creation of the joint account with the decedent was not rebutted because petitioner failed to establish that there was fraud or undue influence in the creation of the account. Moreover, respondent argues that his investiture with a power of attorney is immaterial because no proofs were offered to rebut respondent's claim that the joint account was created before the execution of the power of attorney.

In actions sounding in equity, we review the trial court's conclusion de novo, *In re Conant Estate*, 130 Mich App 493, 498; 343 NW2d 593 (1983), but we accord considerable weight to the trial court's findings of fact because of its special opportunity to hear the evidence and observe the witnesses, *In re Clark Estate*, 237 Mich App 387, 395-396; 603 NW2d 290 (1999), *In re Conant Estate*, *supra* at 498-499. "Findings of fact made by a probate court sitting without a jury will not be reversed unless clearly erroneous." *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993); MCR 2.613(C). A finding is clearly erroneous where, notwithstanding evidence to support the finding, the reviewing court is left with a definite and firm conviction that a mistake was made. *In re Estes Estate*, 207 Mich App 194, 208; 523 NW2d 863 (1994), citing *In re Erickson Estate*, *supra*.

Deposits made to financial institutions in the names of two or more persons and payable to either or the survivor of them becomes the property of both persons as joint tenants. MCL 487.703; *Dep't of Treasury v Comerica Bank*, 201 Mich App 318, 325; 506 NW2d 283 (1993). MCL 487.703 provides in relevant part:

The making of the deposit in such form shall, in the absence of fraud or undue influence, be prima facie evidence, in any action or proceeding, to which either such banking institution or surviving depositor or depositors is a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors.

Nonetheless, this presumption can be rebutted "by reasonably clear and persuasive proof to the contrary, i.e., by proof of the decedent's intent that title to the jointly held funds not vest in the survivor." *In re Cullmann Estate*, 169 Mich App 778, 786; 426 NW2d 811 (1988); *Wechsler v Zen*, 2 Mich App 438, 441; 140 NW2d 581 (1966). However, where the parties are involved in a fiduciary relationship for which the fiduciary receives benefits as a result of the relationship, a presumption arises that the benefits were procured by undue influence, and although the respondent must show by the preponderance of the evidence that undue influence was not operative, the petitioner retains the burden of persuasion. *Conant*, *supra* at 497-498; *Habersack v Rabaut*, 93 Mich App 300, 305; 287 NW2d 213 (1979). The *Habersack* Court explained:

Due to this latter presumption [of undue influence], the burden devolved upon the [respondent] to show, by a preponderance of the evidence, that undue influence was not operative. In satisfying this burden, the [respondent] is benefited by a permissible inference that the joint bank account was intended to pass to the survivor. This permissible inference remains as a vestige of the rebutted statutory presumption. [*Habersack*, *supra* at 305-306 (citations omitted).]

In the present case, respondent has presented evidence sufficient to rebut the presumption of undue influence, and petitioner failed in carrying her burden of persuasion. Our review of the record finds no evidence contradicting respondent's position that his father intended him to receive the joint account funds by right of survivorship. Respondent testified that he believed that he was added as a joint account holder before the signing of the power of attorney, and that this was done at his father's instigation – to facilitate respondent receiving the remainder of the account after all bills and funeral expenses were paid. Title to the joint account vests in the surviving party where the deceased party, who created the joint account, intended that account would become property of the survivor. *In re Cain Estate*, 147 Mich App 615, 624-625; 382 NW2d 829 (1985). Nothing was said by the other witnesses at trial that contradicts this testimony. Respondent's ex-wife did not know when respondent's name was added to the joint savings account. Similarly, petitioner's testimony regarding the joint savings account was that before trial she was not sure that a savings account even existed.

Likewise, respondent presented evidence that he was a daily companion of his father and assisted with errands on a regular basis. He also provided a reasonable explanation for his father's intention to vest title in the bank account with respondent when he testified that his father was angry at petitioner for taking her mother's property and for her infrequent visits. Noteworthy is the hierarchy of authority on the power of attorney that names respondent's ex-wife, not petitioner, to assume the power of attorney if respondent was unable to assume the powers. To the extent that petitioner suggests that respondent's behavior unduly influenced decedent not to sign a will that had been prepared, we do not find that such assertion necessarily affects decedent's intent in establishing a joint bank account with respondent.

From our review of the record, this Court is left with a definite and firm conviction that the decision of the probate court holding that the decedent never intended to vest in respondent the right of possession of those funds in the joint savings account is unsupported by the evidence and clearly erroneous. Accordingly, we reverse the probate court's ruling and award the contents of the savings account to respondent, consistent with the remainder of this opinion.

Respondent also argues that the trial court erred in determining that he was not entitled to reimbursement for funeral expenses paid from the joint account because those funds were his alone pursuant to his right of survivorship. We disagree.

As stated previously, the presumption that decedent's intention was to vest title to the bank account in a surviving joint owner can be rebutted by proof to the contrary. *Cullman, supra*. Having already determined that the trial court erred in failing to recognize decedent's intent to vest in respondent the right of possession of those funds in the bank account, we find no clear error in the trial court's determination that respondent was not entitled to reimbursement of funeral expenses paid from that account. Here, respondent's own testimony indicates that decedent had wanted only the funds that remained in the account after the payment of bills and funeral expenses to pass on to respondent. Respondent's ex-wife testified that the money withdrawn from the account before decedent's death was to pre-purchase decedent's funeral and headstone. Moreover, having been granted the power of attorney, respondent had a fiduciary relationship with decedent. *Conant, supra* at 498. Consequently, this Court concludes that respondent fulfilled his fiduciary duty to decedent by using the funds from the bank account to

pay for funeral expenses and that respondent acted consistent with the intention of decedent that respondent receive the funds after the payment of the bills and funeral expenses. Therefore, respondent was not entitled to reimbursement from the estate for funeral expenses.

Finally, respondent argues that the trial court erred in finding that the disputed diamond jewelry and wedding ring set were part of the decedent's estate and not an inter vivos gift to respondent. We disagree.

Generally, three elements must be satisfied for a gift to be valid: "(1) the donor must possess the intent to transfer title gratuitously to the donee, (2) there must be actual or constructive delivery of the subject matter to the donee, unless it is already in the donee's possession, and (3) the donee must accept the gift." *Davidson v Bugbee*, 227 Mich App 264, 268; 575 NW2d 574 (1998) (citations omitted). If a gift is beneficial to the donee, acceptance is presumed. *Id.*

Here, the trial court found credible petitioner's and respondent's ex-wife's testimony that the decedent repeatedly insisted that the rings were on loan to respondent's ex-wife, rather than respondent's testimony that decedent had told him that the jewelry was to be a gift that would eventually pass to his own daughter and that because the decedent foresaw respondent's eventual divorce, respondent and his father told the wife it was a loan. This Court gives particular deference to a probate court's findings where they are based on the credibility of a witness at trial in light of its special opportunity to hear the evidence presented and see the witnesses before it. *In re Clark Estate, supra*; *In re Erickson Estate, supra*. Respondent's failure to establish a valid gift mandates the inclusion of the diamond jewelry in the estate's inventory. Accordingly, we find no clear error.

In sum, we reverse the probate court's decision regarding the bank account in question. We affirm that portion of the order excluding the funeral expenses and including the diamond jewelry in the estate's accounting and inventory.

Reversed in part, affirmed in part.

/s/ Martin M. Doctoroff  
/s/ Donald E. Holbrook, Jr.  
/s/ Joel P. Hoekstra